20364 SERVICE DATE - APRIL 11, 1997
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41392

HARPER-WYMAN COMPANY--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF JONES TRUCK LINES, INC.

Decided: April 4, 1997

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois, Eastern Division, in Jones Truck Lines, Inc. v. Harper-Wyman Company, Case No. 93 C 4094. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Harper-Wyman Company (Harper-Wyman or petitioner). Jones seeks undercharges of $14,573.57 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 104 less-than-truckload (LTL) shipments of such items as stove parts, wire cooking grids, gas burners or burner heads, thermostat valves, and lava rock char brick between July 21, 1988, and June 30, 1989. All of the shipments were transported from petitioner's facility in Sterling, IL, to points in Missouri, Georgia, Texas, Mississippi, Tennessee, Minnesota, Wisconsin and Nebraska, with the exception of one inbound movement to the Sterling facility. By order dated June 21, 1994, the court dismissed the proceeding without prejudice and directed

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

petitioner to submit issues of tariff applicability and rate reasonableness to the ICC for resolution.[2]

Pursuant to the court order, petitioner, on August 22, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, rate reasonableness, and unreasonable practice. By decision served September 6, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on December 5, 1994. Respondent filed a reply statement on February 3, 1995. Petitioner filed a rebuttal statement on February 20, 1995.

Petitioner, in its opening statement, generally argues that respondent properly rated and billed the shipments at issue in accordance with its lawfully published tariffs, to which an applicable 45 percent discount was applied. Harper-Wyman further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Harper-Wyman supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments a representative sample of the "balance due" bills issued by respondent, which reflect originally issued freight bill data as well as "corrected" balance due amounts. Mr. Bange states that the original freight bills for nearly all of these shipments show on their face the application of a 45 percent discount from the applicable class rates, subject to a minimum charge of $42.00. Petitioner asserts that the freight charges originally billed by Jones for the shipments at issue were charges mutually agreed upon by the parties and were paid in full.

Also attached to Mr. Bange's affidavit are copies of tariff ICC JTLS 630, effective June 2, 1988 (Exhibits B, C, and D), which provides for a 45% discount off class rates for outbound movements (Items 1045 and 2045), a 25% discount off class rates for inbound movements (Item 3025), and minimum charges of $40.00 (Item 10040M) and $42.00 (Item 10042M). To demonstrate that Jones considered its tariff discounts applicable to Harper-Wyman's traffic, Mr. Bange submits a copy of a document signed by a Jones Division Manager dated March 24, 1989, entitled "Customer Pricing Request (CPR) Form," which identified Harper-Wyman as a participant in the ICC JTLS 630 discount tariff (Exhibit H), as well as a document dated March 20, 1989, entitled "FACTS," indicating that Harper-Wyman had been a participant in the Jones 630 tariff Item 1045 at least as early as February 1, 1989 (Exhibit I).

Jones contends that the 45 percent discount originally granted to Harper-Wyman was not supported by an applicable tariff because petitioner did not, as required by the terms of the tariff, provide written notification of its participation in the discount tariff. Respondent maintains, therefore, that the corrected bills reflect the appropriate charge for the service

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[2] The court, referring to two other decisions involving Jones, also found that the NRA applies to claims of a bankrupt former carrier such as Jones.

rendered. It argues, through a verified statement submitted by Stephen L. Swezey, Senior Transportation Consultant for Carrier Services, Inc. (CSI),[3] that the rates assessed initially should have been those on file with the ICC without a discount.[4] With respect to petitioner's claim that section 2(e) of the NRA governs this matter, respondent contests the applicability of that provision on both statutory and constitutional grounds.[5]

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[3] CSI is the organization authorized by the bankruptcy court to audit respondent's records and issue the subject balance due bills.

[4] Mr. Swezey acknowledges the existence of a CPR form applicable to Harper-Wyman traffic bearing an effective date of November 1, 1989, which complies with the participation requirements of tariff 630. The effective date of this CPR is subsequent to the movement of the shipments that are the subject of this proceeding. Mr. Swezey asserts that petitioner has provided no testimony to indicate that any participation request was made prior to November 1, 1989.

[5] As noted, the district court judge in the underlying proceeding here has already determined that the remedies provided in the NRA apply to the undercharge claims of bankrupt carriers such as Jones. Additionally, we point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have likewise determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifshultz Fast Freight Corporation, 63 F.3d 621 (7th Cir, 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177

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DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[6]

We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA." American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Jones no longer transports property. Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written

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B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

[6] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of the January 1, 1996.

evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, petitioner has submitted representative sample documents indicating that the original freight bills issued by respondent consistently applied rates that reflected the tariff discount of 45 percent with a minimum charge of $42.00. In addition, the record contains tariff provisions, a customer pricing request form, as well as another document confirming the existence of a negotiated discount rate. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994)(E.A. Miller).[7]

In this case, the evidence is substantial that the rates originally billed by the carrier and paid for by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier confirm the rates set forth in the tariff provisions and the CPR form and reflect the existence of negotiated rates.

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[7] Jones, at p. 14 of its statement filed February 3, 1995, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that the Board must examine the freight bills reflecting the negotiated rate that were issued by the carrier to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that discounted rates were offered to Harper-Wyman by Jones; that Harper-Wyman tendered freight in reliance on the agreed-to rate; that the negotiated rate was billed and collected by Jones; and that Jones now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Harper-Wyman for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on April 11, 1997.

3. A copy of this decision will be mailed to:

The Honorable Milton I. Shadur
United States District Court for the
Northern District of Illinois,
Eastern Division
U.S. Courthouse
219 South Dearborn St.
Chicago, IL 60604

Re: Case No. 93 4094

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary